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In the Supreme Court of the United States

OCTOBER TERM, 1980

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE APPELLANT

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1.a. The United States Senate and House of Representatives contend in their motions to dismiss the appeal that this Court is without jurisdiction under 28 U.S.C. 1252 to entertain the appeal. This contention is incorrect. Section 1252 provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

The court of appeals is a "court of the United States" for purposes of this statute, *Parker* v. *Levy*, 417 U.S. 733, 742 n.10 (1974), and the proceedings below clearly constituted a

"civil action, suit, or proceeding" to which an agency of the United States—the Immigration and Naturalization Service—was a party. Furthermore, the court of appeals squarely held the "one-House veto" provision in Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. 1254(c)(2), unconstitutional. The only express requisites for an appeal to this Court under 28 U.S.C. 1252 therefore have been met, and the House and Senate do not contend otherwise. In these circumstances, Section 1252 authorizes "[a]ny party" to take an appeal to this Court from the judgment, decree, or order holding the Act of Congress unconstitutional. See *Williams* v. *Zbaraz*, 448 U.S. 358, 366-367 (1980).

The House and Senate argue, however, that 28 U.S.C. 1252 cannot be interpreted to permit INS to take an appeal in this case because, having argued below that the "one-House veto" provision in Section 244(c)(2) is unconstitutional, INS is not "aggrieved" by the decision of the court of appeals. House Motion 7-9; Senate Motion 2-3. This contention is in error, principally because it fails to distinguish between INS's position as a part of the Executive Branch, with a duty to enforce the laws passed by Congress, and its position as a litigant in this lawsuit, entitled (as any other litigant) to express its views on the constitutionality of those laws.

When the House of Representatives adopted the resolution disapproving the suspension of appellee Chadha's deportation, both the immigration judge and the Board of Immigration Appeals concluded that they had no authority to rule on the constitutional issue, and they therefore considered themselves bound by the mandate of Section 244(c)(2) to order Chadha deported. J.S. App. 71a, 73a. However, when Chadha petitioned for review of the deportation order in the court of appeals, INS presented its views on the constitutional question to the court. The court of appeals

was entitled to receive the views of the Executive Branch on this fundamental issue of separation of powers, and INS was obliged to express them. But, INS's presentation of the Executive's view on the constitutional issue did not have any effect on the outstanding order of deportation entered by the immigration judge. The decision of the court of appeals effectively sets aside the order of deportation, deems the immigration judge's initial order suspending deportation final, and orders the Attorney General to "cease and desist from taking any steps to deport [appellee Chadha] based upon the resolution adopted by the House of Representatives." J.S. App. 63a. INS therefore is an "aggrieved party" within the common sense meaning of the term: it is subject to an order of the court below prohibiting it from taking action that it otherwise would take and that it theretofore had initiated.

The cases upon which the House and Senate rely that involved direct appeal to this Court all concerned 28 U.S.C. 1253 or one of its predecessors, Section 266 of the Judicial Code (28 U.S.C. (1928 ed.) 380). Section 1253, like its predecessors, provides for direct appeal to this Court from an order granting or denying an injunction in a case required to be heard and determined by a district court of three judges. In *Public Service Commission* v. *Brashear Lines*, 306 U.S. 204, 206 (1939), the Court held that the defendant could not take a direct appeal to this Court under Section 266 of the Judicial Code from a final decree *denying* the plaintiff's request for injunctive relief against the defendant. Accord, *Gunn* v. *University Committee*, 399 U.S. 383, 390 n.5 (1970); *id.* at 391 (White, J., concurring). In the present case, in contrast, judgment was rendered *against* INS, and the Attorney General was ordered to cease and desist from taking any steps to deport Chadha. J.S. App. 63a. This appeal therefore is brought by a "defendant"—respondent INS, as the Attorney General's agent—against

whom injunctive relief was *granted*. Similarly, in *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151 (1934), and *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645 (1934), the Court dismissed a direct appeal brought under Section 266 of the Judicial Code by the plaintiff *in whose favor* the district court had granted injunctive relief.[1] Although these cases lend support to an argument that appellee Chadha could not take a direct appeal from the judgment below,[2] they do not suggest that a defendant *against whom* injunctive relief is entered—here, INS—may not take a direct appeal to this Court.[3]

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[1] *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U.S. 376, 377-378 (1903), cited by the Senate (Motion 2 n. 1), falls in the same category.

[2] Thus, contrary to the suggestion by the House (Motion 7), INS's right to bring the instant appeal does not depend on a literal and all-encompassing reading of the language in 28 U.S.C. 1252 providing that "[a]ny party" may take an appeal under that section from a decision holding an Act of Congress unconstitutional. INS does not stand in the position of "any party." It is the party whose order of deportation was nullified by the court of appeals and the party that was ordered (as the agent of the Attorney General) to "cease and desist" from taking any steps to deport Chadha. J.S. App. 63a.

[3] For the same reason, the statement in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 333 (1980), that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it," has no application here. *Roper* involved a situation in which the named *plaintiff* in a class action had been awarded all the relief he had sought on the merits. In contrast, the judgment below is not one "affording * * * relief" to INS. *Roper* is inapposite for a number of other reasons as well. The appeal in that case was taken to the court of appeals pursuant to 28 U.S.C. 1291, not to this Court pursuant to 28 U.S.C. 1252, and the case involved a question of mootness, not an interpretation of the statute conferring appellate jurisdiction. Moreover, the Court observed that a party who receives all that he has sought *generally* is not aggrieved by the judgment and cannot appeal from it. Whatever may be the general rule under other statutes, in enacting 28 U.S.C. 1252, Congress has determined that an agency that is a party to a case in which an Act of Congress has been held unconstitutional is "aggrieved" for purposes of taking an appeal from that holding.

b. *United States* v. *Lovett*, 328 U.S. 303 (1946), directly supports INS's right to seek review in this Court. In that case, Congress had enacted a rider to an appropriations bill barring the use of appropriated funds to pay the salaries of certain named Executive Branch employees. The employees brought an action against the United States in the Court of Claims, contending that they were entitled to recover because the statute was unconstitutional. Because the United States agreed with the plaintiffs concerning the validity of the statute, special counsel for Congress appeared as amicus curiae to defend the constitutionality of the appropriations act. After the Court of Claims held the statute unconstitutional, the United States—which had argued that the statute was invalid—petitioned for a writ of certiorari. The Court granted the petition and affirmed the judgment, after hearing argument by counsel for Congress in support of the statute.

The House and Senate suggest that the United States petitioned for certiorari in *Lovett* in order to obtain review for the amicus curiae representing Congress, which could not petition in its own right (House Motion 9-10; Senate Motion 4-5). This may partially explain the Solicitor General's motivation for seeking review of a judgment that the United States supported, although the Brief for the United States states that the United States also sought review because "important constitutional issues are involved which should be resolved by this Court." Brief for Petitioner, Nos. 809-811, 1945 Term, at 2. But whatever the Solicitor General's *reasons* for seeking certiorari may have been, those reasons—including Congress' request—could not alone furnish this Court with *jurisdiction* to entertain the petition. Accordingly, the Solicitor General also was careful to stress that review was being sought by "[t]he United States, *against which judgments were rendered in the court below.*" *Ibid.* (emphasis added). See also *United States* v. *Smith*, 286 U.S. 6 (1932). Thus, at least in cases

involving the constitutionality of an Act of Congress, *Lovett* establishes that a judgment against the United States furnishes a sufficient basis on which the government may seek review in this Court, even though the Executive may have argued against the constitutionality of the statute in the court below.

It must be recalled as well that in *Lovett*, as in the instant case, the Executive argued against the constitutionality of a statute that was believed to infringe upon the prerogatives of the Executive Branch under our system of separation of powers. Especially in this unique context, a proper respect for a law duly enacted by a coordinate branch provides sufficient basis for the Executive to seek and this Court to grant review, even though the Executive cannot argue in support of the constitutionality of the law.[4] The Court may then hear argument in support of the statute's constitutionality—presumably by Congress, appearing either as amicus curiae, as in *Lovett*, or as a party. Such an approach ensures that whatever arguments legitimately may be advanced in support of the constitutionality of an Act of Congress will not be foreclosed in this Court merely because the Executive (which cannot endorse those arguments) was responsible for the conduct of the litigation in the lower courts.[5] See also *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 210 n.9 (1968); page 14, *infra*.

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[4]Thus, an appeal by the Executive would lie in such circumstances even if the *present* Congress did not wish to defend the constitutionality of the statute in this Court. Cf., *e.g.*, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979).

[5]Contrary to the implicit suggestion of the Senate (Motion 6), the fact that the House and Senate intervened after judgment in the court of appeals and have filed petitions for a writ of certiorari to review the judgment below (Nos. 80-2170 & 80-2171) does not indicate that INS may not bring this appeal. When, on January 19, 1981, INS filed its notice of appeal from the December 22, 1980 decision of the court of appeals (J.S. App. 74a), the House and Senate had not even moved to intervene in the case. Thereafter, the House and Senate did move to

c. The right—perhaps even the duty—of INS to bring this appeal is confirmed by the language and purposes of 28 U.S.C. 1252. In enacting that Section, Congress plainly deemed an agency of the United States that is a party to a case in which an Act of Congress it administers is held unconstitutional to be aggrieved by that holding for purposes of taking an appeal.

Section 1252 grants a right of direct appeal to this Court *only* in a case in which the "United States or any of its agencies, or any officer or employee thereof * * * is a party." In other cases in which an Act of Congress is held unconstitutional, an appeal from a decision of the district court must be taken to the court of appeals pursuant to 28 U.S.C. 1291, and review in this Court is available only by writ of certiorari. See 28 U.S.C. 1254(1). This underscores the special status Congress conferred on the government as a party in such a case.

As this Court has stated, the purpose of Section 1252 is "to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus

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intervene. Their motions were granted, but their petition for rehearing in the court of appeals was denied on March 25, 1981. *Id.* at 75a-76a. INS filed a second notice of appeal on April 16, 1981, within 30 days after the rehearing petition was denied, and docketed the appeal on May 1, 1981. *Id.* at 77a-78a; see 28 U.S.C. 2101(a). At that point, of course, there could be no assurance that the House and Senate would seek review to support the constitutionality of the statute. When the House and Senate did seek review almost two months later, they did not similarly invoke this Court's obligatory jurisdiction by bringing an appeal pursuant to 28 U.S.C. 1252 in their own right; they instead filed petitions for a writ of certiorari. The Court's obligatory jurisdiction over INS's perfected appeal was not somehow divested when the House and Senate *subsequently* filed certiorari petitions seeking discretionary review. In any event, the result would be the same even if the House and Senate had sought review by taking an appeal and had done so before the instant appeal was docketed, because one party's right of review is not dependent on the failure of another party to seek review.

will be bound by a holding of unconstitutionality." *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975). Because, in these circumstances, the Executive will be required to conform its conduct to the judicial decision and therefore to disregard the contrary provisions of an Act of Congress, Congress determined in enacting 28 U.S.C. 1252 that a due regard for the role of the Legislative Branch under our system of separation of powers requires that this Court should review a decision that has such an effect.[6]

Congress' purpose of ensuring mandatory review by this Court of decisions holding Acts of Congress unconstitutional where the Executive will be bound by the result applies without regard to whether the Executive itself supports the constitutionality of the statute. Thus, 28 U.S.C. 1252 must be read to authorize the Executive, which represents the federal government in litigation, to take a direct appeal from a decision holding an Act of Congress unconstitutional whenever plausible arguments may be made in support of the constitutionality of the statute,[7] even if the Executive cannot make those arguments itself because they are contrary to the constitutional independence of the Executive Branch. This interpretation allows the statute in

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[6]This congressional judgment is also reflected in 2 U.S.C. (Supp. III) 288k(b), which requires the Attorney General to notify the Senate Legal Counsel of any determination by the Solicitor General not to appeal any judicial decision affecting the constitutionality of an Act of Congress within such time as will enable the Senate to direct the Counsel to intervene in the case.

[7]This Department in the past has declined to take an appeal from a decision holding an Act of Congress unconstitutional if arguments in support of the statute are foreclosed by prior decisions of this Court or would otherwise be wholly without merit, even where the statute has no particular impact on the prerogatives of the Executive Branch. This practice is consistent with the role of attorneys for the government as officers of this Court not to advance meritless arguments. See ABA Code of Professional Responsibility, DR 7-102(A)(2) (1969).

question to be defended before the highest Court by others who are not so restrained, thereby furthering the purposes of Section 1252. As the House Committee on the Judiciary stated in proposing the provision that is now Section 1252, "[t]he importance to the Nation of prompt determination by the court of last resort of disputed questions of the constitutionality of acts of Congress requires no comment." H.R. Rep. No. 212, 75th Cong., 1st Sess. 2 (1937).

Moreover, when an Act of Congress is declared unconstitutional by a lower federal court in a case in which an agency of the United States is a party, a cloud is cast over the validity of the Act in the Nation as a whole (see, *e.g.*, 81 Cong. Rec. 3268-3269 (1937) (remarks of Rep. Sumners)), and the Executive may be forced to take inconsistent positions in other judicial districts or circuits in the administration of the statute. Thus, Congress enacted 28 U.S.C. 1252 to ensure that a definitive resolution of the constitutionality of an Act of Congress is obtained *promptly* whenever a lower federal court has declared the Act unconstitutional. Only this Court can provide such a definitive resolution. See *McLucas* v. *DeChamplain, supra; Fleming* v. *Rhodes*, 331 U.S. 100, 104 & n.6 (1947); *Reid* v. *Covert*, 351 U.S. 487, 490 (1956), vacated on other grounds, 354 U.S. 1 (1957).

In the present case, if INS did not take an appeal from the court of appeals' decision, that decision would be binding precedent only in the Ninth Circuit. In cases arising in other circuits, immigration judges would continue to order deportation of any alien whose suspension of deportation had been disapproved by one House of Congress pursuant to Section 244(c)(2), and INS would deport the alien unless the deportation order was overturned by the court of appeals for that circuit on the alien's petition for review. This state of affairs would allow uncertainty about the constitutionality of the administrative program to persist

for an extended period and could lead to disparate treatment of similarly situated aliens. INS's appeal in the instant case therefore significantly furthers the statutory purpose of ensuring an expeditious decision by this Court.

Nothing in the legislative history of 28 U.S.C. 1252 suggests that an agency of the United States should be barred from taking a direct appeal in circumstances such as these, even though such an appeal would directly further the congressional purposes in enacting Section 1252. To the contrary, the Conference Report, in describing the Senate version of the bill that was eventually enacted, states without qualification that it "provide[s] for a direct appeal by the United States to the Supreme Court where the decision is against the constitutionality of any act." H.R. Conf. Rep. No. 1490, 75th Cong., 1st Sess. 5 (1937). See also H.R. Rep. No. 212, *supra*, at 2 ("It is provided by the committee amendment to this bill that the Attorney General in his discretion may appeal directly to the Supreme Court from *any* decision or order of a lower court which is adverse to the constitutionality of an act of congress * * *") (emphasis added); S. Rep. No. 963, 75th Cong., 1st Sess. 4 (1937) (where the decision is "against the constitutionality of any act of Congress, the *United States* or any other party to such suit or proceeding may appeal directly to the Supreme Court * * *") (emphasis added).[8]

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[8]The possibility that the Attorney General would not defend the constitutionality of a federal statute where intervention was authorized under what is now 28 U.S.C. 2403 was mentioned several times during the House debates on the bill that contained both that provision and the provision now codified at 28 U.S.C. 1252. 81 Cong. Rec. 3266 (1937) (remarks of Rep. O'Connor); *id.* at 3268 (remarks of Reps. Cox and Michener). If Congress had intended to bar a direct appeal by the Attorney General in these circumstances, it presumably would have limited the otherwise unqualified language of Section 1252 that provides for direct appeal.

2. The House of Representatives also argues (Motion 12-14) that this Court lacks jurisdiction over the appeal because there was a lack of "adverseness" between INS and appellee Chadha in the court of appeals. The Senate, in its Motion to Dismiss, does not join the House in this argument. Contrary to the House's suggestion, however, even if the court of appeals were without jurisdiction over the case because of the absence of a case or controversy for Article III purposes, that would not deprive this Court of statutory jurisdiction over the appeal under 28 U.S.C. 1252. *Williams* v. *Zbaraz, supra*, 448 U.S. at 366-368. If the Court considers this case on the basis of INS's appeal, the House will remain free to present its arguments regarding the absence of a case or controversy (*ibid.*) in the same manner as if the Court granted the House's petition for a writ of certiorari raising the same issue. See 80-2170 Pet. I, 23.[9]

In any event, the House's contention that there was no Article III case or controversy in the court of appeals is without merit. INS, after following its established adjudicatory procedures, issued an order requiring Chadha's deportation. If Chadha had not petitioned for review of this order, he would have been subject to deportation, even

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[9] *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971), relied upon by the House (Motion 13), is readily distinguishable in this respect. There the Court concluded that it did not have *statutory* jurisdiction over the appeal under 28 U.S.C. 1253 because neither party sought an injunction prohibiting enforcement of a state statute alleged to be unconstitutional. No such difficulty is present here. The Court also concluded, after briefing and argument, that there was no case or controversy within the meaning of Article III of the Constitution. But unlike in *Moore*, there could be no suggestion in the present case that the proceedings below constituted a feigned suit (cf. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts And the Federal System* 104 (2d ed. 1973)) or that the constitutional issue was presented as a hypothetical or abstract question (cf. *Muskrat* v. *United States*, 219 U.S. 346 (1911)). See pages 11-14, *infra*.

though the Executive believed the "one-House veto" provision that led to the deportation order to be unconstitutional. Thus, as the court of appeals recognized (J.S. App. 22a-23a), Chadha asserted a "concrete controversy" as to whether he would be deported. The petition for review therefore presented a controversy "admitting of specific relief through a decree of a conclusive character" (*Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 241 (1937)), for the court of appeals cancelled the deportation order and directed the Attorney General to cease and desist from taking any steps to carry it out.

This conclusion is not altered by the fact that INS argued in the court of appeals against the constitutionality of Section 244(c)(2). Until and unless the court of appeals entered a decision holding the statute unconstitutional, INS intended to enforce the law by subjecting Chadha to deportation. *In re Metropolitan Ry. Receivership*, 208 U.S. 90, 107-108 (1908);[10] see also *Pope* v. *United States*, 323 U.S. 1, 11-12

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[10]The Court's observation in *In re Metropolitan Ry.* (208 U.S. at 107-108) regarding statutory jurisdiction is equally applicable in the present setting:

> We think that where there is a justiciable claim of some right * * * which claim is not satisfied by the party against whom it is made, there is a controversy, or dispute, between the parties within the meaning of the statute. It is not necessary that the defendant should controvert or dispute the claim. It is sufficient that he does not satisfy it. It might be that he could not truthfully dispute it, and yet, if from inability, or mayhap, from indisposition, he fails to satisfy it, it cannot be that because the claim is not controverted the Federal court has no jurisdiction of an action brought to enforce it. Jurisdiction does not depend upon the fact that the defendant denies the existence of the claim made, or its amount or validity. If it were otherwise, then the Circuit Court would have no jurisdiction if the defendant simply admitted his liability and the amount thereof as claimed, although not paying or satisfying the debt. This would involve the contention that the Federal court might be without jurisdiction in many cases where, upon bill filed, it was taken *pro confesso*, or whenever a judgment

(1944); *Kentucky* v. *Indiana*, 281 U.S. 163, 175-176 (1930). As the Ninth Circuit noted, this Court has recognized the presence of a justiciable case or controversy irrespective of a party's concessions on a legal issue in the case. See, *e.g.*, *Young* v. *United States*, 315 U.S. 257, 258-259 (1942); *Sibron* v. *New York*, 392 U.S. 40, 58 (1968). And, of course, in the present case, a full presentation of opposing views on the legal issues was ensured in any event by the appearance of the House and Senate as amici curiae in support of the constitutionality of Section 244(c)(2). This adverseness will continue in this Court, because the House and Senate are now parties to the case.

This is precisely the manner in which *United States* v. *Lovett* was litigated in the Court of Claims and in this Court. See also *Cheng Fan Kwok* v. *INS*, *supra*, 392 U.S. at 210 n.9; *United States* v. *Smith*, *supra*, 286 U.S. at 30; *Atkins* v. *United States*, 556 F. 2d 1028, 1058 & n.15 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978). This Court perceived no Article III problem in these circumstances, even though the fourth question presented by the United States' certiorari petition in *Lovett*, included at the request of congressional counsel, was "[w]hether the Court of Claims was presented with justiciable controversies." Senate Motion 5 n.6, quoting Petition for Certiorari, Nos. 809-811, 1945 Term, at 2.

Finally, as the court of appeals recognized, to accept the House's argument would be "implicitly [to] approve the untenable result that all agencies could insulate unconstitutional orders and procedures from appellate review simply by agreeing that what they did was unconstitutional.

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was entered by default. These are propositions which, it seems to us, need only to be stated to be condemned. The cases are numerous in which judgments have been entered by consent or default where the other requisites to the jurisdiction of the Federal court existed.

Where, as here, the agency fully intends to enforce its order, it would be a perversion of the judicial process to dismiss the appeal and thereby permit the order to be enforced on such grounds." J.S. App. 23a-24a. Indeed, "[w]ere this case to be not justiciable," congressional action requiring Chadha's deportation from the United States "could never be challenged in any court." *United States* v. *Lovett, supra*, 328 U.S. at 314. See also note 10, *supra*.

The only other alternative available to the Attorney General, in view of the Executive's position that the "one-House veto" provision in Section 244(c)(2) is unconstitutional, would be to ignore a resolution of disapproval passed by one House of Congress and to cancel deportation proceedings and confer permanent resident statuts on the alien. This approach, which would not be subject to judicial review, would be inconsistent with the accepted view that constitutional questions arising in the administration of a statute should, if possible, be resolved by the courts, not by the administrative agency itself. See, *e.g., Johnson* v. *Robison*, 415 U.S. 361, 368 (1974). Because the constitutional question in this case involves a conflict between the Executive and Legislative Branches, it is particularly important that it be resolved by the Judicial Branch. Accordingly, the course that the INS chose to follow—to enforce the statute, in order to ensure a judicial resolution of the controversy, but to refuse to defend the statute once judicial proceedings were initiated—was not merely permissible under the circumstances, but was a responsible and wholly appropriate response to the situation presented by the House resolution requiring appellee Chadha's deportation.

For the foregoing reasons and the additional reasons set forth in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted.

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Solicitor General

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